Bank Negara Malaysia v Co-operative Central Bank Ltd (Jaffnese Co-operative Society Ltd & Ors, Intervenors)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R8–25–12 OF 1989
ABU MANSOR J
13 AUGUST 1992

Receivers *— Liability of receivers — Leave required to sue receivers — Discretion of court to be judicially exercised*

Receivers *— Liability of receivers — Receivers appointed under Essential (Protection of Depositors) Regulations 1986 — Whether common law principles applicable*

The receivers and managers of the respondent, the Co-operative Central Bank Ltd ('the CCB'), were appointed pursuant to an order of the court with powers, inter alia, to manage the business of the CCB, to close or cease its business and to assume the powers of its directors. The appointment was made on the application by Bank Negara Malaysia pursuant to the Essential (Protection of Depositors) Regulations 1986 ('the Regulations'). Following their appointment, the receivers published widely that they would carry on the business of the CCB and assured the public that all deposits placed would be secured. As a result of the assurance given by the receivers, the Koperasi Pasaraya Malaysia or Malaysian Co-operative Supermarkets Society Ltd ('the applicant') began to deposit large sums of money with the receivers. Subsequently, the receivers announced they were freezing the business of the CCB. The applicant then stopped making deposits and claimed for a refund of their deposits. The receivers replied that all deposit accounts had been frozen following the Supreme Court's ruling that all creditors and depositors were to rank pari passu pending further rulings of the High Court on the matter.

By a notice of motion, the applicant sought the leave of the court to sue the receivers for the sum of RM1,362,433.39 being the moneys deposited by the applicant with CCB and interest on the deposit which the receivers had caused to be frozen following the order of the Supreme Court. The issues were: (i) whether leave should be granted to the applicant to sue the receivers on its alleged claim; and (ii) whether the common law principles relating to liability of receivers and managers could be applied to the receivers of the CCB.

Held, refusing the applicant leave to sue the receivers:

(1) The ordinary common law liability of receivers could not be applied to the present facts of the case as it was clear that the receivers appointed by the court could not be said to be exercising

A or performing functions of ordinary free receivers. The receivers work and perform their task subject to and under the directions of Bank Negara which had been given the task of carrying out a 'rescue operation' with the long-distance objective of protecting the interest of all depositors, not just the applicant.

B (2) In any rescue work, the interest of any individual must be subordinated to the interest and common good of all. As such, the granting of leave to sue the receivers would be detrimental to the ultimate good of all those intended to be protected by the Regulations. The granting of leave to sue the receivers is a discretionary matter, which must be exercised judicially. As the granting of leave would be a step backward C on what is attempted to be achieved by the Regulations, and would result in the refusal of many would-be receivers from acting as receivers, it would be unjust in the circumstances to grant leave.

[Bahasa Malaysia summary

D Penerima dan pengurus responden, Co-operative Central Bank Ltd ('CCB'), telah dilantik di bawah suatu perintah mahkamah dengan kuasa, antara lain, untuk mengurus hal perniagaan CCB, untuk menutup atau menamatkan perniagaannya dan mengambil alih kuasa pengarah CCB. Perlantikan penerima dan pengurus itu telah dibuat E atas permohonan Bank Negara Malaysia di bawah Essential (Protection of Depositors) Regulations 1986 ('Peraturan itu'). Berikutan perlantikan mereka, penerima telah mengumumkan secara besar-besaran bahawa mereka akan meneruskan perniagaan CCB dan memberi jaminan kepada orang awam bahawa semua simpanan akan terjamin. Sebagai akibat jaminan yang diberikan oleh penerima, F Koperasi Pasaraya Malaysia atau Malaysian Co-operative Supermarkets Society Ltd ('pemohon') mula menyimpan jumlah wang yang besar dengan penerima. Penerima kemudiannya telah mengumumkan bahawa mereka akan membekukan perniagaan CCB. Pemohon telah berhenti membuat simpanan and menuntut supaya simpanan mereka G dipulangkan. Penerima telah menyatakan bahawa semua akaun simpanan telah dibekukan mengikut keputusan Mahkamah Agung bahawa semua pemiutang dan penyimpan akan berperingkat pari passu sementara menunggu keputusan lanjut Mahkamah Tinggi berkenaan dengan perkara ini.

Melalui suatu notis usul, pemohon telah memohon kebenaran H mahkamah untuk mendakwa penerima bagi jumlah RM1,362,433.39, iaitu wang yang disimpan oleh pemohon dengan CCB dan faedah atas simpanan itu yang telah dibekukan oleh penerima berikutan dengan perintah Mahkamah Agung. Isu di sini adalah: (i) sama ada kebenaran patut diberikan kepada pemohon untuk mendakwa penerima atas I tuntutannya yang dikatakan itu; dan (ii) sama ada prinsip common law berkenaan dengan liabiliti penerima dan pengurus boleh terpakai kepada penerima CCB.

Diputuskan, tidak memberi kebenaran kepada pemohon untuk mendakwa penerima: A

(1) Liabiliti biasa penerima di bawah common law tidak boleh terpakai kepada fakta kes ini kerana adalah jelas bahawa penerima yang dilantik oleh mahkamah tidak boleh dikatakan menggunakan atau menjalankan fungsi penerima bebas yang biasa. Penerima itu bekerja dan menjalankan tugas mereka di bawah dan mengikut arahan Bank Negara yang telah diberikan tugas menjalankan 'operasi menyelamat' dengan objektif jangkamasa panjang untuk melindungi kepentingan semua penyimpan, dan bukan sahaja kepentingan pemohon. B

(2) Dalam mana-mana kerja menyelamat, kepentingan individu mesti dijadikan kurang penting berbanding dengan kepentingan dan kebaikan semua orang. Oleh itu, pemberian kebenaran untuk mendakwa penerima akan menjejaskan kebaikan muktamad kesemua orang yang hendak dilindungi oleh Peraturan itu. Pemberian kebenaran untuk mendakwa penerima merupakan suatu perkara budi bicara yang mesti digunakan secara kehakiman. Oleh kerana pemberian kebenaran akan merupakan suatu langkah ke belakang kepada apa yang ingin dicapai oleh Peraturan itu, dan akan mengakibatkan ramai bakal penerima enggan bertindak sebagai penerima, adalah tidak adil dalam keadaan ini untuk memberi kebenaran.] C D E

Cases referred to

1 *Moss Steamship Co Ltd v Whinney* [1912] AC 254 (refd)

2 *Wong Pot Heng & Anor v Zainal Abidin Putih & Anor* [1990] 2 MLJ 410 (refd) F

Dato' Zaki Tun Azmi (*Benjamin Yean* and *S Thomas* with him) (*Rashid & Lee*) for the applicant.

N Chandran (*P Jayasingam* with him) (*Adnan Sundra & Low*) for the respondent. G

Cur Adv Vult

Abu Mansor J: In this notice of motion, encl (3), dated 17 September 1991, the applicant applied for the following orders:

> That Koperasi Pasaraya Malaysia Bhd be granted leave to sue the receivers, Tuan Haji Zainal Abidin Putih and Tuan Haji Ahmad Kamal bin Abdullah Al-Yafii to claim RM1,362,433.39, as on 30 June 1990, together with interest thereon at 8%pa, thereafter and costs and for a further order that the Koperasi Pasaraya Malaysia Bhd (Malaysian Co-operative Supermarkets Society Ltd) be named as an intervenor in these proceedings, on the grounds stated in the affidavit of Wong Kong Meng affirmed on 16 September 1991 and filed herein. H I

The applicant's application is supported by the affidavit of Wong Kong Meng, encl (2), an accountant employed by the Malaysian Co-operative Supermarkets Society Ltd.

A Mr Kanesalingam said that his client, Koperasi Pasaraya Malaysia Bhd or Malaysian Co-operative Supermarkets Society Ltd, has made several money deposits, in a savings account, at the Co-operative Central Bank Ltd ('the CCB') and has been so operating the savings account for many years. The total deposit was, as on 28 May 1990, RM1,353,539.95. Bank Negara B Malaysia then applied to appoint receivers for the CCB. The applicant society then withdrew all its deposits in the said savings account, leaving a balance of only RM5,240.59 as on 28 February 1989. On 7 March 1989, Tuan Hj Zainal Abidin Putih and Tuan Hj Ahmad Kamal bin Abdullah Al-Yafii were appointed receivers to manage the affairs and properties of the CCB. On or about October/November 1989, the two receivers or their C agents published widely that they would carry on the business of the CCB and assured the public that all deposits placed would be secured. As a result of the assurance given by the receivers, the applicant began to make deposit of large sums of moneys with the receivers. As per exh WKM2 as of 31 May 1990, the amount plus interest was RM1,357,968.84.

D The receivers of the CCB announced at the end of May 1990 that they were freezing all the business of the CCB. The applicant then stopped making deposits. On 28 June 1991, the applicant then claimed for the refund of their deposits. The reply of the receivers, exh WKM5, dated 29 July 1991 said that all deposit accounts had been frozen following the Supreme Court's pari passu ruling for all creditors and depositors on 25 May 1990, E pending further rulings of the High Court on the matter.

Counsel for the applicant submitted that the applicant has a good claim against the receivers for the sum of RM1,362,433.39 as at 30 June 1990 with 8% interest under s 11 of the Civil Law Act 1956 and costs.

Counsel for the applicant cited various authorities, eg *Moss Steamship Co* F *Ltd v Whinney*,[1] which decided that receivers are personally liable for the debt incurred in carrying out business. Further, they are also contractually liable. He submitted further that the authorities are overwhelming that they are liable when, after appointment, they receive money. He submitted that they have to pay on demand of the applicant. He submitted therefore, that the applicant had shown prima facie case to obtain leave.

G Mr Chandran, for the receivers, on the other hand, submitted that it is not disputed that the applicant are depositors. What is also not disputed is that the CCB has been to court since 1989. This is stated in the affidavit of the court-appointed receivers, Hj Zainal Abidin Putih and Tuan Hj Ahmad Kamal bin Abdullah Al-Yafii, encl (5). They were appointed receivers on H 7 March 1989 with powers, amongst others, to manage the business of the CCB to close or cease its business and assume the powers of the CCB's directors.

Mr Chandran submitted that when we deal with the receivers of the CCB, it must be recognized that they are receivers by virtue of an order of court dated 7 March 1989 — that their appointment was pursuant to a I special law, in the form of the Essential (Protection of Depositors) Regulations 1986 ('the Regulations'). The appointment of the receivers was as a result of Bank Negara's application before Eusoff Chin J (as he then was). Counsel submitted that the strict common law principles

governing the appointment of receivers may have been varied either by the provisions of the Regulations and/or the court order dated 7 March 1989 in the light of the expressed pronouncement of their Lordships in the CCB's case before the Supreme Court.

Having been so appointed in accordance with the court order, the receivers started functioning pursuant to the appointment and subsequently in the capacity of persons who had stepped into the shoes of directors of the CCB. Counsel further submitted that whatever the receivers did, they did so within the scope of their appointment — there therefore cannot be the question of personal liability on taking the appointment.

I find merit in the argument of Mr Chandran, to apply the ordinary common law liability of the receivers to the present facts of the case would, in my view, be disregarding or overlooking or sweeping under the carpets the sum total of all that had transpired in the well-known CCB affairs.

It is too clear to be disputed that the receivers that were appointed by the court could not be said to be exercising or performing functions of ordinary free receivers. They work and perform their task subject to and under the directions of the Central Bank or Bank Negara which has been given the massive task of carrying out a 'rescue operation', so to speak, with the long-distance of objective of protecting the interest of all depositors, not just the applicant. With respect, I now cite the judgment of their Lordships of the Supreme Court in *Wong Pot Heng & Anor v Zainal Abidin Putih & Anor*[2] at p 413, to glean into the work of receivers so appointed:

> We shall now consider the relevant provisions of the 1986 Regulations. Under reg 9(1), where the Central Bank, ie Bank Negara, is satisfied that a body like the CCB is a deposit-taker, it may do one or more of the following for the protection of the depositors:
>
> (a) require the deposit-taker to forthwith cease all or any transactions or activities relating to its business, and refund all moneys paid by any depositor in such manner as the Central Bank may direct;
> (b) assume control of and carry on the whole or any part of the business of the deposit-taker as the Central Bank deems fit, or appoint any person to do so on the Central Bank's behalf;
> (c) apply to the High Court to appoint a receiver to manage the affairs and property of the deposit-taker and for such incidental or ancillary orders or directions in relation to such appointment as may, in the opinion of the Central Bank, be necessary or expedient;
> (d) in the case of a corporation, present a petition to the High Court for the winding up of the corporation, and the court shall accordingly have the power to make an order for the winding up of the corporation, notwithstanding anything contained in the Companies Act 1965;
> (e) in the case of a co-operative society, require the Registrar-General of Co-operative Societies to make an order for the cancellation of the registration of the co-operative society, and the Registrar-General shall accordingly cancel the registration of the co-operative society and shall have the power to do so upon being so required notwithstanding anything contained in the Co-operative Societies Act 1948; or
> (f) in the case of a pawnbroker, direct any licensing officer appointed under sub-s (2) of s 10 of the Pawnbrokers Act 1972 to cancel the licence granted

A under the Act to the pawnbroker, and such licensing officer shall accordingly cancel the licence and shall have the power to do so on being so directed notwithstanding anything contained in that Act.

But by virtue of reg 9(2) because the CCB is registered as a co-operative society with limited liability under the Co-operative Societies Act 1948, Bank Negara cannot exercise any of the powers conferred under reg 9(1) unless it is satisfied that the CCB is unable or is likely to become unable to meet its deposit liability to any extent. Thus in relation to a co-operative society, depending on the state of insolvency of the deposit-taker at the relevant time and other considerations that Bank Negara may deem necessary to take into account, the choice of actions that it finally takes under the provisions of reg 9(1) would in our view reflect the type of salvage operation and consequently the extent or degree of protection that it intends to confer on the depositors.

For total or complete protection of the depositors in relation to a co-operative society, Bank Negara would in our opinion be expected to act under para (a) which would ensure the refund of all moneys paid by the depositors, or under para (b) by assuming direct control of the deposit-taker and pursuant to reg 9(3)(a) either by itself or its appointees, carrying on the whole or any part of the business of the deposit-taker until such time as:

(i) the deposit liabilities of the deposit-taker have been repaid or the Bank Negara is satisfied that suitable provision has been made for their repayment; or

(ii) Bank Negara is of the opinion that it is no longer necessary or expedient to do so.

In the case of the CCB, Bank Negara has deemed it necessary and expedient to apply to the High Court under para (c) of reg 9(1) to appoint receivers to manage the affairs and property of the CCB, and to apply for incidental or ancillary orders or directions in relation to such appointment as contained in the court order of 7 March 1989 (see pp 51–57 of the appeal record). We must not therefore confuse the application made to the High Court by Bank Negara and the subsequent application made to the same court by the receivers which has given rise to the dispute under appeal. The former, not the latter, would determine the degree and type of protection to be given to the depositors under reg 9. The distinction in our view is important so that the issue of protection of depositors can be distinguished from the issue at hand which is limited only to one of priority of payments between depositors and the two retrenched employees of the CCB in a situation in which Bank Negara has at the relevant time, elected to mount salvage operation under reg 9(1)(c).

I have, after that, to answer the question whether I should grant leave to the applicant to bring suits against the receivers as applied for by the applicant. To do so would be to shut my eyes to the obvious that they were appointed to do the rescue work. In any rescue work, I am bound to say the interest of the individual, for the good of all, must be subordinated to the common good of all. I am of the view that the granting of such leave would be detrimental to that ultimate good of all in which the Central Bank wishes to protect all depositors, as the Regulations had intended.

Leave, as is well known, is a discretionary matter which must be exercised judicially. Weighing carefully what the effect of granting and refusing is, I am clear in my mind that the immediate effect of granting leave would be

a step backward on what is attempted to be achieved by the Regulations. Granting leave would result in the refusal of many would-be receivers from acting, as their protection is immediately lifted when they had, in truth performed acts subject to orders of the Central Bank by virtue of the Regulations. Considering all matters before me, I find it is unjust in the circumstances to grant leave. Leave is therefore refused with the hope that time will correct itself and allow the applicant to have their moneys refunded and, in the meantime, the applicant must therefore wait like everyone else. Leave is refused with costs to the respondent.

Leave to sue refused.

Reported by Wong Kim Fatt